Office-Supreme Court, U.S.
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No. 943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

CHARLOTTE SLAVITT, *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLOTTE SLAVITT
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IN THE

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OCTOBER TERM, 1961

No.

CHARLOTTE SLAVITT, *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Your Petitioner, Charlotte Slavitt, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above-entitled cause dated December 6, 1961.

OPINION BELOW

The opinion of the Court below, dated December 6, 1961 (App. A, *infra*, 1a-8a), has not yet been reported. A timely petition for rehearing (R. 181-216) was overruled February 7, 1962. (R. 217)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. In September 1949, did the Department of Labor have the power to make an E.O. 9830, Schedule A, attorney appointment: "Not to exceed duration of war and six months thereafter" when E.O. 9063 and the War Service Regulations were revoked and rescinded in 1946, and the Civil Service Commission, in 1947, had specifically forbidden such appointment tenures for attorneys?

2. That appointment specifically terminating the "extension" of a prior temporary one, was Petitioner actually serving as a "permanent employee" with an "unlimited duration" appointment, *cf Elder* v. *Brannan*, 341 U.S. 277, and is the lower Court's decision in conflict with *United States* v. *Wickersham*, 201 U.S. 390?

3. Did the Department of Labor, upon the ground of "a limited appointment", illegally deny the Department of the Navy's request for reemployment rights for Petitioner upon her "release" thereto in April 1951, in contravention of her rights under E.O. 9830, *supra*; E.O. 10180, and C.S. Regs. 8.113-115, 5 CFR (1950)?

4. Does the record support the finding that Petitioner had "signed" a resignation at the Department of Labor when Government's Exhibit 21 shows she *wrote:* "Transfer to Dept. of Navy"?

5. Does the whole record support the finding that Petitioner had not "transferred" when, *inter alia*, she changed positions "during continuous Federal service

without a break of one work day from one agency to another", 5 CFR 4301(a)(17)(1951); when the Navy Department reemployment rights procedure and appointment followed Commission regulations for such transfer, except as to the reflection of reemployment rights; when Petitioner's accrued annual and sick leave were transferred; and when Petitioner continued at the Navy Department under the Civil Service Retirement Act by "continuity of service" under E.O. 10180, Sec. 3.

6. Was Petitioner entitled to the remedial tenure rights prescribed by Sec. (a) of the *Second* "Whitten Amendment", 65 Stat. 757, for "permanent employee" interagency transferees; and, under reduction in force regulations pursuant thereto, *infra*, did she properly belong in Group II-B, at the level of Contract Specialist, GS-12, and in Group I-B, "at and *below*" the level of GS-11?

7. Did the Court have the power to grant summary judgment in this case or does the record show genuine issues of material fact?

STATUTES, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

Pertinent statutes, executive orders, and regulations are printed in Appendix B, *infra*.

STATEMENT

This Petition is directed against the Court of Claims' denial of jurisdiction on Petitioner's two separate claims for recovery under 28 U.S.C. 1491:

(1) For the Labor Department's deprivation of her reemployment rights as attorney, GS-11, in contraven-

tion of rights as a "permanent employee" claimed under the following:

> *E.O.* 9691, Feb. 4, 1946, 11 Fed. Reg. 1381; *E.O.* 9830, Feb. 24, 1947, 12 Fed. Reg. 1259, and Rule 2.3(b) thereof and pursuant Civil Service Commission, hereinafter called Commission, Departmental Circulars, No. 497, Supp. 2, April 15, 1947, and No. 497, Supp. 3, August 26, 1947; and *E.O.* 10180, Nov. 13, 1950, 15 Fed. Reg. 7745, and pursuant regulations 8.113-8.115, incl., 5 CFR (1950), and D.C. 653, Feb. 23, 1951, as shown *infra*. (App. B, *infra*) (R. 66-76; 111; 148-157)

(2) For the deprivation of augmented tenure rights prescribed by Sec. (a) of the *Second* "Whitten Amendment",[1] Nov. 1, 1951, 65 Stat. 757, for permanent employees who had made inter-agency transfers under the *First* "Whitten Amendment",[2] Sept. 27, 1950, effective Sept. 1, 1950, 64 Stat. 1066, *and not made dependent upon "competitive status"*, which converted such transfers "to a permanent basis" at their prior agency grade levels; and pursuant to which, valid reduction in force regulations placed such promoted and transferred employees in both Groups I and II, at their respective prior and current grade levels, and as *exceptions* to the definition contained in Group III, *infra*. (App. B, *infra*) (R. 76-86; 157-161)

The Court below ignored both specific claims. It refused acknowledgment of a single one of the executive orders, and of the *Second* "Whitten Amendment", and of any of the regulations pleaded under 28 U.S.C. 1491. It refused cognizance of the official inter-agency "re-

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[1] Sec. 1310, Supplemental Appropriation Act, 1952.

[2] Sec. 1302, Supplemental Appropriation Act of 1951.

lease and reemployment rights" documents in the record. (Deft's Exs., not indexed, pp. 43, 42). The questions whether Petitioner was a "permanent employee" at the Labor Department, whether she made an inter-agency transfer in April 1951, have no actionable significance in this case *except* as predicated upon her specific claims for recovery under the mandates claimed violated. And absent the Court's consideration of the very mandates upon which claims are lodged under 28 U.S.C. 1491, both jurisdiction and the barest elements of due process are unlawfully denied.

In addition to that of E.O. 9830, this case covers the period of E.O. 10180, *supra*, and three "Whitten Amendments", when employee rights and Commission regulations were constantly changing. New words were regulated for old actions, such as "Indefinite Appointment" for "Inter-Agency Transfer", *infra*. The Court below refused cognizance of these changes, as well as of details of fact reflecting such changes.

On Procedural Issues: Prior to Petitioner's employment by the Labor Department in April 1949, appointments "for the duration of the war and for six months thereafter" had been originally authorized for the stated emergency by Sec. 2. of E.O. 9063, Feb. 16, 1942, and pursuant Reg. V, Sec. 4(*c*) of the War Service Regulations. 3 CFR (1938-1943 Cum. Supp.) 1091-1092; 5 CFR 18.5(b), (1943 Supp.)

E.O. 9691, Feb. 4, 1946, 3 CFR (1946 Supp.) 95, declared the emergency ended, directed the Commission to restore and prescribe "permanent" personnel procedures, and to replace all persons occupying positions under war service and other temporary durations. The War Service Regulations were rescinded by super-

seding Temporary Civil Service Regulations, effective March 8, 1946, prescribing procedures for the "Transitional Period". 11 Fed. Reg. 1424, et seq. 5 CFR 4.301(a) (16) and (19), (1949 Supp.) (App. B, *infra*, pp.)

E.O. 9830, Feb. 24, 1947, 3 CFR (1947 Supp.) 108 et seq., in turn revoked E.O. 9691, *supra*, and established the new Civil Service Rules prescribing the "permanent" personnel policies and rules for the federal civil service, effective May 1, 1947. The Temporary Civil Service Regulations were rescinded by new "permanent" regulations pursuant to E.O. 9830, *supra*, and the Rules thereof. 12 Fed. Reg. 2839. Under Rule VI of E.O. 9830, attorney positions were taken out of the competitive service and placed in Schedule A.

Rule 6.1(e) of E.O. 9830, 3 CFR (1947 Supp.) 108, 113, authorized the appointing officer "in his discretion" to fill "any position in Schedule A . . . in the same manner as competitive positions are filled." Under Rule 2 of E.O. 9830, C.S. Reg. 2.113(a) provided:

> "A person selected for other than temporary appointment shall be given a probational appointment." 5 CFR 2.113(a) (1949)

The "equivalent" of a probational appointment in the competitive service for a Schedule A excepted attorney position under E.O. 9830 was an appointment with an "unlimited duration"; *Elder* v. *Brannan*, 341 U.S. 277, 283. A temporary appointment was one "for a period not to exceed 6 months". 5 CFR 2.114(c)(1)(i) (1949 Supp.) Further in force in 1949:

> *Rule 2.3(b) of E.O. 9830* providing: "The Commission may determine the types, duration and conditions of war service and other temporary ap-

pointments, and may prescribe the method for replacing persons holding such appointments." 3 CFR (1947 Supp.) 108, 111.

Pursuant thereto, the Commission withdrew from the agencies the power *to retain or appoint* attorneys under such war service durations:

D.C. No. 497, Supp. 2, April 15, 1947 (Plf's Ex. 78, p. 242):

"4. . . . authority to effect appointment to attorney positions under section 2 of Regulation VIII [Temporary Regs], and to continue in employment attorneys appointed under section 2 of Regulation VIII or under the War Service Regulations, *is hereby withdrawn* effective May 1, 1947, *pursuant to section 2.3(b)* of the Civil Service Rules."

D.C. No. 497, Supp. 3, August 26, 1947 (Plf's Ex. 79, p. 244):

"2. Departmental Circular No. 497, Supplement No. 2 *withdrew authority for continuing* the employment of attorneys originally appointed under section 2 of Regulation VIII or under the War Service Regulations." (Italics supplied)

Petitioner received three appointments, and one reassignment to a permanent position at the Labor Department under E.O. 9830, C.S. Reg. 6.101(d), Schedule A, as attorney, P-4 [GS-11].

In the Court below, Petitioner claimed the war service tenure imposed by the third appointment was in violation of the above mandates; and that, as of that time, she was in law and fact serving as a permanent employee in a permanent position under an "unlimited duration" appointment, and was unlawfully denied reemployment rights and Sec. (a) *Second* "Whitten

Amendment "augmented tenure rights. *Elder* v. *Brannan*, 341 U.S. 277.

Petitioner's first appointment, in April 1949, was a temporary one, with duration "Not to exceed June 30, 1949." The second, effective July 1, 1949, was an "Extension" of that appointment, with duration "Not to exceed September 30, 1949." (Deft's Exs. 1, 2, pp. 3-4) No further "extension" of a "temporary" appointment could be made "beyond 6 months from the date of original appointment" without the prior approval of the Commission. 5 CFR 2.114(c)(1)(i) and 2.114(c)(1)(iii) (1949 Supp.)

The third appointment, effective Sept. 4, 1949, reads: (Deft's Ex. 3, p. 5)

> "Duration of employment: Not to exceed duration of war and six months thereafter. This terminates previous excepted appointment limited to 9-30-49."

Under this new appointment, Petitioner was made subject to the Civil Service Retirement Act (Deft's Ex. 3, item 20); and, in October 1950, received a periodic step-increase in pay. (Plf's Ex. 8, p. 45)

Effective September 18, 1949, Petitioner received a Reassignment to "vice" a "vacancy" in permanent position "P-4-970, C.S.C. No. 485", in the "Division of International Affairs (Legal)", and continued under the Retirement Act. (Deft's Ex., not indexed, p. 6) Under this reassignment, she received an Entrance Efficiency Rating of "Excellent" [last Government rating at Corps of Engineers], as changed to a position of "different service, class, or grade." (Plf's Ex. 9, p. 46)

While at the Department of Labor, Petitioner had passed a competitive civil service examination as Contract Specialist (Negotiation), Grade GS-12. Certified, among others, from that register, she accepted a position at that higher grade at the U. S. Navy Purchasing Office, Washington, after arranging at the Labor Department to transfer on Monday, April 9, 1951, with a few days of annual leave immediately prior thereto. As instructed, she wrote Friday, April 6, 1951 as the last leave day, Saturday and Sunday not being charge days. (Plf's Ex. 8(a), P. 45(a); Plf's Ex. 1, p. 3, Affidavit)

On March 26, 1951, the Labor Department gave Petitioner page 2 of Defendant's Exhibit 21 to fill out at top. She wrote the date; and, as "last working day", "Friday, April 6, 1951". As reason for leaving, Petitioner *wrote* the words: "*Transfer to Dept. of Navy*", and signed her name. (Italics supplied)

That is what the Court below finds to be Petitioner's "signed" resignation.

Defendant's Exhibit 21 (2 pp.) is a Form 52 departmental "Request For Personnel Action" from lower echelon authorities to higher. Petitioner's Affidavit states she had nothing to do with, and never saw, page 1 of that Exhibit until she received a duplicate of the Exhibit during her 1959 discovery proceedings. She asked to see the original of both pages but was told they were not available. Page 1, lists "Resignation—to accept indef. appt. in Dept. of Navy". Plaintiff's Affidavit states she did not resign, and had no cause or need to resign; and defendant's brief submit none. (Plf's Ex. 1, pp. 3-4) (Please see Record, pp. 153; 149; 196)

Then in effect was Reg. 4.301(a)(17), 5 CFR (1951):

> "Transfer" means a change of position during continuous Federal service without a break of one work day from one agency to another, or, while serving continuously within the same agency, from one official headquarters or post of duty to another.

In force also was the *First* "Whitten Amendment", Sept. 1950, *supra*, enacted to prevent "permanent personnel" increases during the new national defense emergency. Sec. (a) required that "*all* . . . transfers or promotions *to positions in the Federal civil service* shall be temporary." E.O. 10180, *supra*, Sec. 1(b), provided that "all promotions, *transfers of personnel from one agency to another*" be made on a "nonpermanent basis." The Commission promptly abolished "Transfer" as a name for personnel actions.[3] An "Inter-Agency Transfer" was now to be shown as "Indefinite Appointment". (T.S. 316, Nov. 13, 1950; Plf's Ex. 82, pp. 248-249, top) (Italics supplied).

Sec. (c) of the statute authorized the Defense Department "to call on other departments . . . for additional personnel." Sec. 2(a) of E.O. 10180 required Commission regulations

> "governing the release of employees (both within and outside the competitive service) by any agency in the executive branch of the Government for employment in any other agency and governing the establishment, granting, and exercise of rights to reemployment in the agencies from which employees are released."

Sec. 2(b) of the Order limited reemployment rights "to the last position he occupied on a permanent basis or in one of equal seniority status, and pay: . . ."

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[3] "Transfer" was forced back to usage one year later under the Second "Whitten Amendment".

The Commission thereupon suspended existing regulation 8.101-8.106 (cited in Defendant's Brief, R. 130) on Nov. 15, 1950, 15 Fed. Reg. 7748, promulgating *new* provisions, effective December 1, 1950, *and in force at the time of Petitioner's transfer:*

> 8.113. *Movement of employees between organizational units.* (a) After September 1, 1950, the employment without a break in service of employees of other agencies shall be *by indefinite appointment rather than by transfer.* * * *
>
> 8.114. *Release with reemployment rights.* (a) It shall be the responsibility of the agency to determine whether its employees may be released with reemployment rights for employment in another agency. Whenever it determines that under standards issued by the Commission, the release of an employee will be in the interest of the defense program, the agency shall release such employee with reemployment rights. *A permanent employee shall be eligible for release with reemployment rights unless he has received, or is about to receive, a reduction-in-force notice.* * * *
>
> * * * * *
>
> 8.115. *Appointment of employees released with reemployment rights.* (a) The Commission hereby delegates authority to agencies to give indefinite appointments to employees who have been released with reemployment rights by the agency in which employed: *Provided*, The standards of the Commission are met and the promotion restriction of 8.109 of this part are observed. (Italics supplied)[4]

D. C. No. 653, Feb. 23, 1951, issued the "standards" and procedures governing reemployment rights. Par.

[4] Under this regulation, "Promotion" defined as meaning a higher grade "while serving continuously within the same agency" under 5 CFR 4.301 (a) (10) (1949), is now broadened to apply to a higher grade when making an *inter-agency* transfer.

1(b) authorized reemployment rights for "Permanent *employees serving under excepted appointments*". (Plf's Ex. 81, p. 246).

The procedure required an official notice from the defense agency to the nondefense agency, identifying the position offered and requesting the employee's release and reemployment rights. (Plf's Ex. 81, p. 246 (a)).

By letter dated March 26, 1951, the Navy Department advised the Labor Department of its position offer, adding: (Deft's Ex., *not indexed*, p. 43):

> "It is requested that Miss Slavitt be released with reemployment rights and that this activity be advised as to the date on which the proposed appointment may be effected."

By reply dated March 30, 1951, the Labor Department stated: (Deft's Ex., *not indexed*, p. 42)

> "Reference is made to your letter of March 26, 1951, requesting the release of Miss Charlotte Slavitt, Attorney-Adviser, GS-11, for appointment to the proposed position of Contract Specialist, (Negotiation) in your agency.
>
> "The Department will release Miss Slavitt effective at close of business April 6, 1951. Miss Slavitt will not be entitled to reemployment rights with this Department *as she is now serving under a limited appointment.*" (Italics supplied)

It is to be noted that "resignation" was *not* given as the ground for the denial of reemployment rights.

Petitioner's Navy Department appointment, April 9, 1951, reads: "Indefinite Appointment (from U.S. Dept. of Labor)", showing inter-agency transfer with-

out break in service. (FPM, R1-30.02, Feb. 21, 1951; Plf's Ex. 83(a), p. 251) Instead of C.S. Reg. 8.115(a) [showing reemployment rights], the "authority" lists: "C.S. Cert. #H-8689, CSC, 3-2-51." (Deft's Ex. 5, p. 8)

Labor's Form 50, dated April 30, 1951, lists: "Resignation (from Excepted Appointment)." With "Reason for Separation: To accept position with Department of the Navy." (Deft's Ex. 4, p. 7)

Sec. 1 of the Lump Sum Leave Payment Act, Dec. 21, 1944, 58 Stat. 845:

> "That whenever any . . . employee of the Federal Government . . . is separated from the service . . . he shall be paid compensation in a lump sum for all accumulated and current accrued annual or vacation leave to which he is entitled under existing law."

The Labor Department did not pay Petitioner for such leave; her accrued annual and sick leave were transferred to Navy. (Deft's Exs. 4, p. 7; 21)

Neither Labor's Form 52 or Form 50 shows any civil service authority for the alleged "resignation" action.

E.O. 10180, Sec. 3, *supra*, prohibited Civil Service Retirement coverage for nonpermanent appointments "unless eligible for retirement benefits by continuity of service." Persons given new appointment were under Social Security coverage. (Plf's Ex. 82, p. 249) Petitioner left Labor with, and continued at Navy under, Civil Service Retirement coverage. (Deft's Exs. 4-5, pp. 7-8)

The Second "Whitten Amendment", Nov. 1, 1951, by Sec. (a), provided "all transfers of permanent

employees made on a temporary or indefinite basis since September 1, 1950" shall be changed to a permanent basis" as of Nov. 1, 1951, and "shall retain their status as permanent employees in the agency to which transfered at the grade . . . of their permanent positions in the agency from which transferred." Such conversion was not made dependent upon "competitive status." A *Third* Whitten Amendment, June 5, 1952, authorized permanent promotions under certain circumstances.

On July 1, 1952, Capt. B. Tieslau, Officer-in-Charge, certified as follows: (Deft's Ex., not indexed, p. 45)

> "Miss Slavitt is a Permanent employee serving under an Indefinite Appointment."

On July 31, 1953, Petitioner was reduced in force, as being in the competitive level of Contract Specialist, GS-12, Group III-B. Commission reduction in force regulations, pursuant to the Second and Third "Whitten Amendments" provided: 17 Fed. Reg. 11735

> (1) *Group I—Career.* In the competitive service, this group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, *except that career employees serving under conditional promotions shall be considered in this group with respect to positions at and below the grade in which they last served on a permanent basis.* . . . 5 CFR 20.4(c)(1) (1952)
>
> (2) *Group II—Career-Conditional.* In the competitive service, this group includes *career employees who are conditional because they* are serving probationary periods or *are "temporary" or "indefinite as the result of promotion, transfer,* or reinstatement, or are subject to some other limitation of a similar nature . . . 5 CFR 20.4(c)(2) (1952) (Italics supplied)

In force also, under the remedial legislation of the *Second* and *Third* "Whitten" legislation, were these changed definitions: "Promotion", which by Regs. 8.115 and 8.109, *supra*, was made to apply to inter-agency transfers under the *First* Whitten Amendment, was specifically amended to include "advancement to a higher rate" in another agency. 18 Fed. Reg. 303, Jan. 15, 1953. "Transfer", which had included changes inter- and intra- agency, was now made to apply solely to inter-agency transfers, 5 CFR 4.301(a)(15) (1953).

In the Court of Claims, Petitioner sought recovery for back pay as Contract Specialist, GS-12. Upon all the grounds urged, and under the above reduction in force regulations, as in the equivalent Navy Department regulations, App. B, *infra*, p. , she claimed she properly belonged in Group II-B as Contract Specialist, GS-12, being "indefinite as the result of promotion, [and] transfer". And if there properly reached for reduction in force, then in Group I-B, "at and below" the level of Contract Specialist, GS-11, as "serving under a conditional promotion" and as a "permanent employee" under the *Second* "Whitten Amendment" at the grade "of their permanent positions in the agency from which transferred." And, if then properly reached for reduction, she had been rightfully entitled to reemployment at the Labor Department at Grade GS-11, and was entitled to recovery on such basis. On receiving her reduction in force notice, Petitioner sought reassignment to a position in a lower grade, but this was denied. No reductions in force were effected for any Contract Specialist competitive level except that of GS-12. (Plf's Ex. 1, pp. 30-31, Affidavit)

Petitioner had urged these same grounds before the Commission's Board of Appeals and Review which evaded making any rulings on the specific issues raised; stating merely that Petitioner was properly placed in Group III-B

Opinion of Court: The Court adopted the Government's briefs practically *in toto,* with defendant's misstatement of facts in the record.

The Court held that the September 1949 appointment "Not to exceed duration of war and six months thereafter" was not a "war service" duration because the "term 'war service'" was not used; that the appointment could not have been illegally made under the War Service Regulation because that Regulation had already "expired" in 1946; that it was a "time limitation" appointment, like her prior temporary ones; and Petitioner, therefore "could not have been a permanent employee" at Labor. Further, that the duration being

> "merely a limitation of the duration of her employment which, since the war was not officially over, was a valid restriction on plaintiff's employment." (App. A, *infra*, p. 6a)

The Court finds Petitioner had "signed" a resignation, finds that she *said* she was resigning "in her signed Form 52" which "was a request for personnel action" as "resignation to accept position with" Navy, and that Labor's Form 50 also listed that as the "reason for separation" and showed "resignation". The Opinion states that Petitioner said her transfer "was done without interruption in service" but the Court finds that if the transfer of her annual and sick leave

"was not authorized, we can only assume it was a mistake."

The Court holds Petitioner had not "transferred" because she received an "indefinite appointment" at Navy (omitted is the Navy showing "from U.S. Dept. of Labor"); that C.S. Reg. 2.115(a) required all *new* appointments to be indefinite; that Petitioner's Navy appointment showed it was made "under the authority of the Civil Service Certificate #H-8689", and therefore it was a *new* appointment. The Opinion states the Whitten Amendment was passed to prevent permanent personnel increases during the (Korean) war, and petitioner could only have received an indefinite appointment under this statute and Reg. 2.115(a), (App. A, *infra*, p. 4a) Therefore, the Court continues, since Petitioner did not acquire "competitive status", under C.S. Reg. 4.301(a)(5) (1950) she could not have "transferred" because that regulation defined "competitive status" as "a status which permits a person to be promoted, transferred, reassigned, and reinstated to positions in the competitive service *without competitive examination* . . . subject to Commission regulations *"for such noncompetitive actions."* (Italics supplied) Thus:

> ". . . whether she resigned or not, she had not acquired competitive status which was necessary to put her in the classified civil service *as required for her transfer.* (Italics supplied) (App. A, *infra*, pp. 3a-4a)

The Court therefore concluded Petitioner had been properly placed in Group III-B.

REASONS FOR GRANTING WRIT

Certiorari should be granted because of the importance of the principles and issues involved in federal personnel administration and the impact of the Court's decision upon basic federal employee rights under laws designed to provide fair, equitable and uniform treatment for all employees. The fundamental question here is whether an executive agency, at individual whim and caprice, may impose a tenure long before extinct, and then use that action as a ground to deny reemployment rights the employee is entitled to under her lawful tenure. With the further result that she is additionally deprived of legal and property tenure rights guaranteed by a later statute.

On each point below the Court's opinion conflicts with 28 U.S.C. 1491 and with the established principles and applicable decisions of this Court, in the respects indicated:

1. The Court Erred in Failing and Refusing to Take Judicial Notice of the Statute, Executive Orders, and Valid Regulations Pleaded.

Executive orders are part of the law of the land, of which all courts and officers must take judicial notice and give effect to. *Givens* v. *Zerbst*, 255 U.S. 11, 18; *Jenkins* v. *Collard*, 145 U.S. 546, 560-561. An executive order has the force of a statute, 91 *C.J.S.* 66-67, and the Courts have no power to disregard a validly enacted and applicable statute, *United States* v. *National City Lines*, 334 U.S. 573, 589. Whenever a statute or executive order entrusts a government department with the power to prescribe regulations, the regulations adopted become an integral part of the statute or executive order, and must be judicially noticed. *Lily* v.

Grand Trunk R. Co., 317 U.S. 481, 488; *Cuba* v. *United States*, 152 U.S. 211, 222.

As stated *supra*, the Court refused to acknowledge a single one of the executive orders or regulations, or the Second Whitten Rider, upon which Petitioner lodged her claims under 28 U.S.C. 1491.

2. The Court Erred in Upholding as Valid the Labor Department's September 1949 Tenure: "Not to Exceed Duration of War and Six Months Thereafter"; and Erred in Failing and Refusing to Hold Petitioner Was Serving as a Permanent Employee Under an Unlimited Duration Appointment in a Permanent Position, and Was Unlawfully Denied Reemployment Rights.

There is no merit to the Court's rulings on the "war service" appointment. The tenure "Not to exceed duration of war and six months thereafter" *was* the "duration" designated "war service". That was the "duration" solely authorized by E.O. 9063 (1942), and in the pursuant War Service Regulations. That was the "duration" prescribed by the Board of Legal Examiners for attorneys, *Elder* v. *Brannan*, 341 U.S. 277, 281, in its regulation:

> "(g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period . . . . *Such appointment shall be effected under Executive Order No. 9063* of Feb. 16, 1942 (Title 3) . . ." 5 CFR 17.1 (Cum. Supp. 1943)

Upon the demise of the Board, that was the "duration" prescribed for attorneys by the Commission in D.C. 497, July 1944, (Plf's Ex. 76, p. 238):

> ". . . Such [atforney position] is to be made under Section 4(c) of War Service Regulation V for

the period of the war and not to exceed six months thereafter."

When E.O. 9691 (1946) revoked E.O. 9063, it revoked the power to make such "durations". When the War Service Regulations were superseded by the Temporary Civil Service Regulations, that "duration" was dead for new appointments. And when E.O. 9830 (1947) prescribed the "permanent" personnel policies and rules, and the Commission, pursuant to Rule 2.3(b) thereof, twice specifically forbade the retention or employment of attorneys under such "durations", it was buried.

Whether or not the war was "officially over" has nothing to do with this issue. This Court has several times held that the date of the termination of World War II depended upon the provisions of the specific statute to be applied—as has the Court of Claims. *Lee* v. *Madigan*, 358 U.S. 228, 230; *Marcos* v. *United States*, 122 C. Cls. 641.

The Court below, in adopting the Government's argument on this point furnishes not a single authority for its rulings. The claim that the prescribed duration was a "time limitation" like her other Labor Appointments is contrary to Reg. 2.114(*c*)(1)(i) (1949), *supra*, authorizing only a time limitation "for a period not to exceed 6 months." Plainly, an appointment "Not to exceed duration of war and six months thereafter" exceeded 6 months. Defendant argued Reg. 2.114(c), *supra*, did not apply to excepted appointments. If not, under what authority were plaintiff's two prior appointments made? No other authority was offered.

The lower Court's decision constitutes a dangerous precedent for which certiorari should be granted,

Hurn v. *Oursler, et al.*, 289 U.S. 238, 240. It invites "administrative lawlessness". Almost all of a federal employee's rights depend upon, and vary with, tenure. Petitioner's "extension" of her prior temporary appointment terminated, she must be held to have been serving under the only one then lawful, an appointment with an "unlimited duration" under which petitioner was a permanent employee in a permanent position. *Elder* v. *Brannan, supra. Cf. Abt* v. *United States*, 146 C. Cls. 205. And Petitioner was entitled to all the rights and privileges belonging to her rightful tenure. *United States* v. *Wickersham*, 201 U.S. 390; *Caddington* v. *United Stats*, C. Cls., 178 F. Supp. 604; *Belsky* v. *United States*, C. Cls., 290 F. 2d 593. The lower Court's decision on this issue is in conflict with the decisions of this Court holding that revoked and rescinded executive orders and regulations have no operative effect and are as if they never existed; and there is no power in an administrative agency by action, or in a court by construction, to perpetuate such mandates. Such revocations cannot be questioned or defied. *Helvering* v. *Newport Co.*, 291 U.S. 485; *Ex Parte McCardle*, 7 Wall. (U.S.) 506, 514; *United States* v. *Eliason*, 16 Pet. (U.S.) 291, 302.

One fact is clear: If E.O. 9830 (1947) had not returned the federal civil service to "permanent" personnel procedures, there would have been no cause or need for the new authorization of the First "Whitten Amendment", (1950), supra, under which the indefinite procedures were adopted for the new war emergency.

The lower Court's ruling is further in conflict with decisions of this Court holding that administrative

actions contrary to, or in excess of, the power granted by executive order or statute are unwarranted assumptions of power and an impairment of property rights. *Peters* v. *Hobby, et al*, 349 U.S. 331; *Greene* v. *McElroy*, 360 U.S. 474, *Harmon* v. *Brucker*, 355 U.S. 579.

As a permanent employee, Petitioner was unlawfully deprived of her reemployment rights by the Labor Department contrary to the provisions of E.O. 9691; *supra;* of E.O. 9830, and Rule 2.3(b) thereof, and pursuant Commission regulations cited *supra;* and contrary to the reemployment rights provisions of E.O. 10180 and Commission regulations 8.113-8.115, incl., 5 CFR (1950), and D.C. 653, Feb. 23, 1951 (Plf's Ex. 81) *supra*. She was therefore entitled to a judgment in her behalf under the decisions of this Court in: *United States* v. *Wickersham*, *supra; Peters* v. *Hobby*, *supra*. Also *Simon* v. *United States*, 113 C. Cls. 182.

3. The Court Erred in Its Decision That Petitioner Had "Signed" a Resignation and Had Not Transferred.

The Court's findings on this point are grossly erroneous. Several times, in several ways, the Opinion states Petitioner "signed" a resignation, and speaks of "her signed Form 52" as her resignation. As Defendant's Exhibit 21, p. 2, shows, Petitioner *wrote* the words: "Transfer to Dept. of Navy."

On the matter of transfer, the Court failed to see the facts proving "transfer" on the documents so closely examined for evidences of "resignation." It ignored provisions of E.O. 10180 and Regs. 8.113-8.115 (1950), under which the facts establish "transfer". It refused recognition of the basic fact that, for and during that period, the Commission had abolished the word "Transfer" in personnel action names (R. 73; 78; 156); and

all appointment actions, including "Inter-Agency Transfer" were shown by "Indefinite Appointment", where "not limited to 1 year or less". T.S. No. 316, Nov. 13, 1950, Plf's Ex. 82, p. 248. Only two documents in the record use the word "resignation". The Labor Department's page 1 of Form 52, and its Form 50 which Petitioner did not receive until several weeks after she had started work for Navy. The Court states Petitioner was given an "Indefinite appointment" at Navy (App. A, *infra*, p. 2a) That appointment" at Navy *reads:* "Indefinite Appointment (from U. S. Dept. of Labor)", showing transfer with no break in service.

Versus the designation of Labor's "resignation" are these documented facts, not a single one of which would have occurred in the event of "resignation", and which establish that *both* the Labor Department and the Navy Department *knew* Petitioner's change was a "Transfer", and treated it as a transfer (R. 70-76):

> (a) Petitioner's Labor Department annual leave from March 28, 1951 to April 6, 1951 (Plf's Exh. 8a, p. 45(a)); (b) Navy's request for "release" and with "reemployment rights", March 26, 1951; and Labor's "release" effective April 6, 1951 and denial of reemployment rights on the ground of "a limited appointment," March 30, 1951 (Deft's Exs., not indexed, p. 43, 42); Labor's transfer, *not payment*, of Petitioner's accrued annual leave, and sick leave (Deft's Exhs. 21 and 4, p. 7); Under "Remarks" in both Labor and Navy's Forms 50, the notice that the action taken is subject to post-audit and correction, as required by Sec. (a) of the *First* "Whitten Amendment" for "all reinstatements, transfers or promotions to positions in the Federal civil service"; Petitioner's *continuation* under the Civil Service Retirement Act, as provided for "continuity of service" under E.O.

10180 (Deft's Ex. 5, p. 8; Ex. 4, p. 7); Petitioner's change of position during *continuous* Federal service without a break of one workday ("Transfer" Reg. 4.301(a)(17)(1951)); Navy's appointment showing "(from U. S. Dept. of Labor)" (Deft's Ex. 5, p. 8); C.S. Reg. 8.113 (1950) requiring such transfer to be "by indefinite appointment rather than by transfer", *supra;* Navy's "civil service or other authority" for the action taken, shown as the certificate number and *Not* as Reg. 2.115(a), the authority for *original* appointments then made in the federal civil service. (T.S. 316, Nov. 13, 1950, Plf's Ex. 82, p. 249

The Court's ruling that Navy's citation of the certificate number proves that the appointment was a new one, made under Reg. 2.115(a) is difficult to follow. Use of the certificate number establishes precisely the opposite—that it was not a new appointment, but that since reemployment rights had been denied, the certificate number was used instead of Reg. 8.115(a). And Labor's Form 50 should have shown Reg. 8.114(a) as separation with reemployment rights. (Plf's Ex. 83 (a) and (b), pp. 251-252). Transmittal Sheet 316, *supra*, Plf's Ex. 82, p. 248, states: "A new section 2.115 'Indefinite appointment' has been added to the Regulations . . . . Indefinite appointees under section 2.115 (original appointments) will serve a trial period of one year (p. 249)." Reg. 2.115(a) states: ". . . On and after December 1, 1950, all *new* appointments shall be indefinite appointments . . . ." (Italics supplied) Selection of appointees from the civil service register resulting from competitive examination, where such eligibles were available, was required by E.O. 10180, Sec. 1(c); (See also Rep. Whitten, Sept. 21, 1950, 98 Cong. Rec. 15416), (R. 156).

Further, the Court's reliance upon the "competitive status" definition to prove Petitioner could not have "transferred" is clearly an erroneous conclusion because that section covers *qualification* for position changes within the competitive service "without competitive examination". Petitioner qualified by competitive examination. And "transfer" was not then used but "indefinite appointment" for all appointments.

The Court's findings on this point are clearly erroneous as unsupported by substantial evidence, against the clear weight of the evidence, and in part is induced by an erroneous view of the law then prevailing. Under such circumstances, this Supreme Court will reverse, where convinced a mistake was made. *McAllister* v. *United States*, 348 U.S. 19, 20; *Dobberstein* v. *United States*, 363 U.S. 278, 291.

Further, the Court has no power to issue summary judgment in favor of the defendant if the record discloses genuine issues of material fact. Petitioner's Affidavit states she did not resign. (Plfs' Ex. 1, p. 3-4). No opposing affidavit statement was filed by Defendant. While the weight of fact and law is unquestionably on the side of "transfer", nevertheless, the Labor documents listing "resignation" and Petitioner's Affidavit plus other documents in the record, are opposed on this point. The Court cannot try a case on a motion for summary judgment where a substantial issue of material fact exists, even on cross-motions for summary judgment. Petitioner's cross-motion stated if "material issues of fact do exist, plaintiff moves the Court to refer this cause back to the Commissioner for trial upon such issues . . ." (R. 43) And where they exist, the summary judgment must be set aside. *Poller* v. *Colum-*

bia Broadcasting System, Inc., 368 U.S. 464; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256; *Fountain* v. *Filson*, 336 U.S. 681; *Hycon Mfg. Company* v. *Koch & Sons*, 219 F. 2d 353, cd. 349 U.S. 953; Rule 51(d), *United States Court of Claims.*

4. Petitioner Was Entitled to Her Augmented Tenure Rights Under the Second "Whitten Amendment".

The *Second* Whitten statute was a remedial statute to correct inequities caused to the *First* Whitten Amendment permanent employee inter-agency transferees by Commission regulations pursuant to E.O. 10180, *supra.* Sec. (a), of the *First* "Whitten Amendment" *required* "all reinstatements, transfer or promotions to positions *in the Federal civil service* shall be temporary." Sec. 1(b) of E.O. 10180 required only that "all promotions, transfers of personnel *from one agency to another*" be nonpermanent. There promptly followed abolishment of the word "Transfer", and a dichotomous set of Commission regulations by which permanent employees who had made intra-agency changes retained all permanent rights. But permanent employees who made inter-agency transfers lost all rights of permanency and dropped way down on the low retention preference groups. (R. 73, 77) (Plf's Ex. 82, pp. 249-250)

The Second "Whitten Amendment", Sec. (a), remedied that situation by equalizing those rights, providing that such inter-agency transfers made since Sept. 1, 1950, be converted to a permanent basis and that permanent employees become the permanent employees of the new agency at their prior agency grade level. (App. B, *infra*, p. 10a) (Senate Doc. #35, pp. 7, 8; March 18,

1953, "Analysis of the Whitten Amendment; Plf's Ex. 84; p. 253) (R. 78-80)

Pursuant thereto, and to the *Third* "Whitten Amendment", *supra*, which authorized making promotions permanent, Commission regulation 20.4(c), in force at time of Petitioner's reduction in force, placed her in Group II-B at GS-12, and in Group 1-B, at GS-11, *supra*. The Navy Civilian Personnel Instruction, Reductions in Force, Feb. 10, 1953, Reg. 170.3-3*b* (1) and 170.3-3*b* (2) followed the Commission regulation for Groups I and II, respectively, and are valid. NCPI 170.3-7, however, provided that "Competitive civil-service status is one of the elements of retention Groups I and II." (R. 85-86) No authority for this pre-requirement of "competitive status" is contained in the Second Whitten Amendment, or in the Commission's reduction-in-force regulation. And such requirement completely negates the purpose, intent, and clear language of the Second Whitten Amendment. The Second Amendment was made to apply to permanent employee inter-agency transfers under the First Amendment. Both statutes use the phrase "permanent employee." The Second statute gave a right that, under Commission discriminatory regulations, had been taken away from such employees. It augmented the tenure of such employees to that of "permanent employees" at their new agency. And since no one could acquire competitive status under indefinite appointments, all persons who had made inter-agency transfers, with or without promotions, would automatically be placed in the Group III definition under NCPI 170.3-7 as "serving under non-status, non-temporary appointments in the competitive service." 5 CFR 20.4(c)(3) (1952); NCPI 170.3-3*b* (3); (R. 76-86)

There being no authority for the NCPI Reg. 170.3-7 in the Whitten remedial statute, and that regulation being contrary to the reduction in force regulation of the Commission to whom the primary power for making such personnel regulations is given under various statutes, and specifically given under the *Second* (as well as the *First*) Whitten statute to effect its provisions and purposes, NCPI 170.3-7 must fall as being in excess of the powers of the Department of the Navy. *Peters* v. *Hobby, et al, supra.* There is no power in an administrative agency to add to, or subtract from, the plain terms of an Act of Congress. *United States* v. *Standard Brewery Co.*, 251 U.S. 210, 217-220; *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134; *Harmon* v. *Brucker, supra.*

In failing and refusing to uphold Petitioner's rights under the *Second* Whitten Amendment and that she properly belonged in Group II-B at the level of Contract Specialist GS-12, "as the result of promotion and transfer", and in Group I-B, "at and below" the level of GS-11, "as serving under a conditional promotion" (Group II), the Court of Claims' decision is in conflict with the decisions of this Court that judgment must be rendered in favor of a federal employee for administrative violation of a statute, executive order, or Commission regulation. And also for violation of a valid regulation of the employee's own department. *United States* v. *Wickersham, supra; Peters* v. *Hobby et al, supra; Service* v. *Dulles*, 354 U.S. 363; *Watson* v. *United States*, 355 U.S. 14. It is further in conflict with decisions holding that a remedial statute must be liberally construed in the light of its prime purpose, and the protection of the employees it covers, *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481, 487; and in connection with previous legislation on the subject so that its remedial

purpose will be enforced. *U.S. ex rel Chott* v. *Ewing*, 237 U.S. 197; *Corralitos Co.* v. *United States*, 178 U.S. 280; *United States* v. *National City Lines*, *supra* at 589.

CONCLUSION

Emergency tenures are an ever-recurring event in national crises. Those ended, "permanent" procedures invariably were restored. The Court below, without a dissenting view, in substance has ruled that an administrator may legislate at will the perpetuation of a revoked law. Its decisions largely govern administrative practices in federal employee pay matters. There is no intermediate review, and the granting of writs of certiorari, where contested, is rare in pay cases. Statistically and practically, therefore, the decisions below are those of both first and last resort. This Court's rulings that administrators have no divine right to be lawless, and the Court of Claims' own body of law protecting federal employee rights under the law, have been wholly contravened in this case. This decision now authorizes violation of E.O. No. 10577, Nov. 22, 1954, 3 CFR 218 (1954-1958 Comp.), which revoked E.O. 10180 itself and provided new "permanent" Rules for career and career-conditional appointments, and of P.L. 380, Ch. 866, Aug. 12, 1955, 69 Stat. 709, requiring such appointments under stated qualifications. Under this precedent, administrators may ignore those laws at whim and continue to utilize the revoked indefinite procedures under E.O. 10180, with judicial authority and impunity.

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLOTTE SLAVITT,
Petitioner, Pro Se
2515 Kay Street, N. W.
Washington 7, D. C.

May 1962

APPENDIX A

IN THE

UNITED STATES COURT OF CLAIMS

No. 205-55

(Decided December 6, 1961)

CHARLOTTE SLAVITT

v.

THE UNITED STATES

Charlotte Slavitt, pro se.

Richard R. Mollcar, with whom was *Assistant Attorney General William H. Orrick, Jr., for defendant.*

On Defendant's and Plaintiff's Motions for Summary Judgment

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiff, a nonveteran and former employee of the Navy Department, seeks to recover back pay from the date of her separation on the ground that she was illegally separated by reduction in force. She contends that she was placed in the wrong group in her competitive level. Plaintiff also contends that the action of the Department of the Navy in separating her and the decision of the Civil Service Commission sustaining her separation were arbitrary.

Three questions are presented in this case: (1) whether plaintiff's separation by reduction in force was properly effected; (2) whether plaintiff was properly placed in subgroup III-B on the retention register; and (3) whether the actions of the Department of the Navy and of the Civil Service Commission were arbitrary.

Regarding the first question—plaintiff became employed by the Department of the Navy in 1951 and was given an indefinite appointment as a Contract Specialist, GS-12, effective April 9, 1951, under authority of Civil Service Certificate No. H-8689, Civil Service Commission, dated March 2, 1951.

As the result of the anticipated decrease in work load for the fiscal year 1954 for the Navy Purchasing Office, the Chief of the Bureau of Supplies and Accounts directed in June of 1953 that the personnel ceiling of the purchasing office be reduced by 25 persons. It was decided that one GS-12 Contract Specialist would be eliminated. Therefore, plaintiff was placed in group III-B in her competitive level for the purpose of compiling the retention register. Since the only other two positions in plaintiff's competitive level were held by subgroup A employees, plaintiff was separated.

The above gives rise to our problem. If plaintiff's appointment was properly an indefinite one which did not confer civil service status, then she was properly placed in subgroup III-B on the retention register.

The defendant contends that at the time plaintiff received this appointment, it did not confer civil service status and such was the only type that could be given.

We must look to the record of employment, the statutes, and the civil service regulations for the answer.

Plaintiff contends that she did not resign her position with the Department of Labor; that she merely transferred to the Department of the Navy. She says this was done without interruption in service and that her annual leave and sick leave were transferred.

The record shows that on March 26, 1951, plaintiff signed a Form 52 which was a request for personnel action. This form shows the nature of the action requested as "resignation to accept position with the Department of the Navy."

The official records of the Department of Labor contain a Standard Form 50, which is a notification of personnel action. This form shows the nature of action "resignation (from excepted appointment)" and further states "reason for separation: To accept position with Department of the Navy."

Thus it is apparent that not only did plaintiff in her signed Form 52 say that she was resigning from the Department of Labor, but that the Department of Labor also so understood as is shown by its notification of personnel action. Furthermore, the Navy Department also must have believed that plaintiff had resigned and was being given a new appointment because in its notification of personnel action it is noted that plaintiff was appointed under the authority of Civil Service Certificate H-8689, March 3, 1951. This indicates a new appointment.[1]

Since it was a new appointment, what then was plaintiff's status in the Navy Department?

At the time of plaintiff's appointment there was in effect the Whitten Amendment, 64 Stat. 1066, which provided that all appointments after September 1, 1950, and during the fiscal year 1951, should be indefinite appointments. The reasoning and purpose of Congress in enacting the Whitten Amendment is obvious. As a natural consequence of war, more than a normal amount of employees was necessary. After cessation of hostilities, naturally the inflated employee rolls would no longer be needed. Hence the Whitten Amendment was designed to give the various agencies the right to discharge employees under these circumstances. See *Moyer* v. *United States*, No. 543-58, decided July 15, 1960.

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[1] Plaintiff's annual leave and sick leave were transferred. If this were not authorized, we can only assume it was a mistake.

Civil Service Regulation 2.115(a), 5 C.F.R. (1952 Supp.), provides:

> *Indefinite appointment*—(a) In general. On and after December 1, 1950, all new appointments shall be indefinite appointments except those of postmasters in all classes of post offices and, in unusual circumstances, appointments to positions for which the Commission determines that probational appointments are in the interest of the service: *Provided*, that agencies may give probational appointments after that date to eligibles who were regularly selected from certificates issued prior to December 1, 1950, for probational appointment. Such indefinite appointments shall be made from the Commission's registers of eligibles unless there are insufficient available eligibles. The Commission may restrict certification for indefinite appointment to eligibles that are immediately available because of residence or other conditions. The first year of service under an indefinite appointment shall be a trial period similar to the probationary period established by § 2.113. *Persons given such appointments do not thereby acquire a permanent civil service status.*

Thus under the Whitten Amendment, *supra*, and the civil service regulation 2.115(a), *supra*, plaintiff could only have received an indefinite appointment.

The question then is whether under this "indefinite appointment" plaintiff was properly placed in group III—indefinite.

The civil service retention preference regulation defines group III as follows:

> Group III—Indefinite. This group includes persons serving under non-status, non-temporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any conditions or limitation other than a conditional promotion or reinstatement or a specific time limitation of one year or less. Within this group, persons entitled to veterans preference are in

sub-group "A" and others in sub-group "B". (5 C.F.R. 20.4(c)(3)-(1952 Supp.).)

Plaintiff did not have competitive status as is demonstrated by her brief on page 23 thereof, wherein she states: "Plaintiff makes no claim to competitive status and urges less confusion on this point." Since she was given the only appointment available; *i.e.*, indefinite appointment, and since she had no competitive status, it is clear that plaintiff was properly placed in group III. As a nonveteran she was also properly placed in subgroup "B". Having been properly placed in group III-B for the purpose of computing a retention register, her rights naturally followed those having more retention points.

The retention register compiled under the aforesaid circumstances showed as follows:

Competitive Area: Navy Purchasing Office
Competitive Level: Contract Specialist, GS-12
Service Count Date: 6-26-53

Name	Subgroup	Service Comp. Date	Retention Point
Sachs, Ruth	I-A	1-15-43	
Leizear, William	III-A	6-15-43	10 yrs. 0 mo. 12 da.
Slavitt, Charlotte	III-B	4-30-46	7 yrs. 1 mo. 27 da.

Therefore, since plaintiff had less retention rights than the other two employees in her competitive level she was properly reached for separation.

Consequently neither the Department of the Navy nor the Civil Service Commission's Board of Appeals and Review were in any way arbitrary or capricious in their actions regarding plaintiff in this respect.

Plaintiff seeks to avoid the impact of the above by the contention that she was a permanent employee when she went to work for the Navy and that having been a perma-

nent employee at the Department of Labor she was an interagency transferee to the Navy.

Assuming *arguendo* that plaintiff did not resign and accept a new appointment with the Navy Department, the record is clear that plaintiff's three appointments at the Department of Labor were designated as excepted appointments, all with limitations as to the duration of employment.

The first appointment, effective April 25, 1949, was designated "excepted appointment" with a duration of employment "not to exceed June 30, 1949."

Effective July 1, 1949, plaintiff was given an "extension of excepted appointment" with a duration "not to exceed September 30, 1949."

Plaintiff's third appointment effective September 4, 1949, was designated "excepted appointment" with a duration "not to exceed duration of war and six months thereafter."

Since plaintiff's appointments were all "excepted" with a time limitation, she could not have been a permanent employee at the Department of Labor.

Plaintiff says the last appointment was an illegal attempt to appoint her under war-service regulations, thereby making her a permanent employee. However, nowhere in the notification of personnel action is the term "war service" used, and indeed it could not have been since the war service regulation expired March 7, 1946, prior to her appointment. It was merely a limitation of the duration of her employment which, since the war was not officially over, was a valid restriction on plaintiff's employment.

Furthermore, since plaintiff did not have competitive status at the time of her employment with the Dept. of Labor, she could not have transferred to the Navy Department. Competitive status is defined by the civil service regulations as follows:

> "Competitive status" means a status which permits a person to be promoted, transferred, reassigned, and reinstated to positions in the competitive service without competitive examination, subject to the conditions prescribed by the Civil Service rules and regulations for such noncompetitive actions. A competitive status is acquired by probational appointment through competitive examination, or may be granted by statute, Executive Order, or the Civil Service rules. (5 C.F.R. 4.301(a)(5) (1959 Supp.)).

Thus it is clear that plaintiff not only resigned and accepted a new appointment with the Navy Department, but whether she resigned or not, she had not acquired competitive status which was necessary to put her in the classified civil service as required for her transfer.

Plaintiff's final contention is that the actions of the Navy Department and the Civil Service Commission were arbitrary. As we have previously demonstrated, the action of the Navy in placing plaintiff in group III was proper and not arbitrary, nor could the Civil Service Commission have been arbitrary in sustaining the action of the Navy Department in this respect.

What action then does plaintiff contend was arbitrary? She apparently bases her contention on an allegation that certain Navy officials were "out to get her."

We can find nothing in the record, other than plaintiff's own affidavit, to sustain this argument. The record fully discloses that the only reason for plaintiff's dismissal was for the purpose of a valid reduction in force. Moreover, the affidavit of Captain Tieslau, the officer in charge, reveals that this was the purpose and that nothing else affected the action. This court has always recognized the strong presumption that public officials act in good faith,[2] and there is nothing in the record to overcome this presumption.

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[2] *Knotts* v. *United States*, 128 Ct. Cl. 489; *Librach & Cutler* v. *United States*, No. 191-57, decided December 2, 1959.

The Civil Service Commission fully and fairly considered these charges and found them to be without foundation. Furthermore, since all the actions relating to plaintiff's removal in the reduction in force were proper, the contention that something occurring long before her separation was arbitrary is not properly for this court's determination, and is of no significance in this action.[3]

Since plaintiff was properly placed in group III and properly reached for separation, and since no arbitrary action of the Navy Department or of the Civil Service Commission is shown, plaintiff cannot recover in this action.

Defendant's motion for summary judgment is granted, and plaintiff's cross-motion is denied. Plaintiff's petition will be dismissed.

It is so ordered.

DARR, *Senior District Judge*, sitting by designation; DURFEE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

APPENDIX B

Statutes, Executive Orders, and Regulations (In Pertinent Part)

1. Civil Service Act of 1883, 22 Stat. 403

> SEC. 2. That it shall be the duty of said commissioners:
>
> FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

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[3] The affidavit of plaintiff reflects that the events referred to which she alleges took place in the Navy Purchasing Office occurred in 1951 and 1952. She was separated July 31, 1953.

2. Sec. 1491, U.S.C. Title 28:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States. . . ."

3. Rule 51(d), U.S. Court of Claims:

". . . The [summary] judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

4. Section 1302 of the Supplemental Appropriation Act, 1951, Sept. 27, 1950, 64 Stat. 1066

After September 1, 1950, and during the fiscal year 1951:

(a) In making appointments in the Government service the Civil Service Commission shall make full use of its authority to make temporary appointments in order to prevent increases in the number of permanent personnel and no employee in the Federal civil service promoted, transferred or appointed to a position of higher grade shall be eligible, in the event of separation from the service through reduction in force, to reinstatement at a grade above the grade held by such employee on September 1, 1950; and all reinstatements, transfers or promotions to positions in the Federal civil service shall be temporary and for positions subject to the Classification Act of 1949 shall be made with the condition and notice to the individual reinstated, transferred or promoted that the classification grade of the position is subject to post-audit and correction

by the appropriate departmental or agency personnel office or the Civil Service Commission;

• • •

(c) The Department of Defense is authorized to call on other departments or agencies for such additional personnel as it may require within the limits of its funds.

5. Section 1310 of the Supplemental Appropriation Act, 1952, Nov. 1, 1951, 65 Stat. 737

SEC. 1310. Immediately upon the enactment of this Act and until termination of the national emergency proclaimed by the President on December 16, 1950:

(a) The Civil Service Commission and the heads of the executive departments, agencies, and corporations shall make full use of their authority to require that initial appointments to positions in and outside the competitive civil service shall be made on a temporary or indefinite basis in order to prevent increases in the number of permanent personnel of the Federal Government above the total number of permanent employees existing on September 1, 1950: *Provided*, That any position vacated by a permanent employee called to military service or transferred to a national defense agency shall not be filled except on a temporary or indefinite basis. All reinstatements and promotions in the Federal civil service shall be made on a temporary or indefinite basis, and all permanent employees who are transferred from one agency to another shall retain their status as permanent employees in the agency to which transferred at the grade or basic pay level of their permanent positions in the agency from which transferred.

• • •

All transfers of permanent employees made on a temporary or indefinite basis since September 1, 1950,

shall be changed to a permanent basis as of the effective date of this Act: *Provided*, That such employees shall retain their status as permanent employees in the agency to which transferred at the grade or basic pay level of their permanent positions in the agency from which transferred.

* * * *

(b) The Civil Service Commission shall facilitate the transfer of Federal employees from nondefense to defense activities and encourage the retention of employees in defense activities, and shall provide reemployment rights for permanent employees in the activities from which such employees are transferred.

6. E. O. No. 9063, Feb. 16, 1942, 7 Fed. Reg. 1075

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

7. E. O. No. 9691, Feb. 4, 1946, 11 Fed. Reg. 1381

DIRECTING THE CIVIL SERVICE COMMISSION TO RESUME OPERATIONS UNDER THE CIVIL SERVICE RULES, AND AUTHORIZING THE ADOPTION OF SPECIAL REGULATIONS DURING THE TRANSITIONAL PERIOD.

WHEREAS Executive Order No. 9063 of February 16, 1942, was designed to expedite recruitment for Federal positions during the war period, and to defer the permanent filling of vacancies while millions of citizens in the armed forces and in war industries were unavailable to compete for permanent appointment; and

WHEREAS the release of men and women from the armed forces and from war industries has progressed to such a degree that certain procedures adopted under Executive Order No. 9063 are no longer deemed necessary and it is desirable that returning veterans and others formerly not available for consideration be given opportunity to compete for permanent appointment; and

• • •

1. The United States Civil Service Commission is directed to resume, as rapidly as its resources will permit, the announcement of open competitive examinations and the establishment of registers of eligibles, for the purpose of certifying eligibles for regular probational appointment to fill vacancies which may occur in the classified (competitive) service and to replace persons who do not have permanent tenure and who are occupying positions in the classified (competitive) service under war-service or other temporary appointments.

• • •

7. The Civil Service Commission shall, before July 1, 1946, submit recommendations for a general revision of Schedule A of the Civil Service Rules . . . Persons serving under war-service appointments in any such position so excepted may be retained therein until Schedule A is specifically amended to include such positions, and unless specifically limited to one year or less, new appointments made under this section shall not be regarded as temporary appointments: Provided that no person shall continue in employment under the authority of this section after December 31, 1946, unless the position occupied by such person shall have been included under Schedule A. . . .

• • •

9. Executive Orders Nos. 9863 of February 16, 1942 . . . are hereby revoked.

S. E. O. No. 9830, Feb. 24, 1947, effective May 1, 1947, 12 Fed. Reg. 1259

SEC. 01.2. *Civil Service Commission responsibilities under this order.* (a) The Commission shall be responsible to the President for the proper application of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes and Executive orders imposing responsibilities on the Commission.

• • •

(d) The Commission shall prescribe procedures to be followed by agencies in connection with removals, demotions, and suspensions in the competitive service which will insure equitable and uniform treatment to employees against whom adverse action is proposed.

(e) The Commission shall, when consistent with law and with the economical and efficient administration of the Government, delegate to the agencies its authority to act in personnel matters in accordance with standards issued by the Commission.

(f) The Commission shall maintain an adequate system of inspection to determine that equitable and sound application of statutes, Executive orders, regulations and standards *relating to personnel management* is being carried out by the agencies. Whenever the inspection indicates failure on the part of an agency to adhere to established policies, regulations and standards, the Commission shall take such action as may be appropriate to bring about adherence thereto. In this connection, the Commission may suspend or revoke any delegation of its authority.

• • •

SEC. 01.3. *Agency responsibilities for personnel management.*

(a) The head of each agency, in accordance with applicable statutes, Executive orders, and rules, shall be responsible for personnel management in his agency. . . .

• • •

The following Executive orders are hereby revoked:

• • •

No. 9691 of Feb. 4, 1946.

9. E. O. No. 10180, Nov. 13, 1950, 15 Fed. Reg. 7745

SEC. 1 (a) On and after December 1, 1950, and until such time as the President may find it no longer necessary in the interest of the national defense, all appointments in the executive branch of the Government shall be made on a nonpermanent basis except those of Presidential appointees and postmasters in all classes of post offices: . . .

(b) On and after September 1, 1950, and until such time as the President may find it no longer necessary in the interest of the national defense, all promotions, transfers of personnel from one agency to another, and, except as provided by section 2(b) hereof, reemployment of former Federal employees shall be on a nonpermanent basis; and on and after December 1, 1950, any reassignment may, in the discretion of the head of the agency concerned, be on either a permanent or nonpermanent basis.

(c) To the extent not inconsistent with this order, appointments and position changes in the competitive service shall be made in accordance with civil service laws, rules, and regulations.

• • •

SEC. 2 (a) The Civil Service Commission, whenever it determines it to be necessary in the interest of the national defense, shall prescribe regulations governing the release of employees (both within and outside the competitive service) by any agency in the executive branch of the Government for employment in any other agency, and governing the establishment, granting, and exercise of rights to reemployment in the agencies from which employees are released.

(b) In carrying out the provisions of section 9 of the Selective Service Act of 1948, as amended, or any other legal authority granting the right to reemployment in the Federal service, the Commission shall prescribe regulations limiting the right to reemployment of an individual to employment in the last position he occupied on a permanent basis or in one of equal seniority, status, and pay: . . .

SEC. 3. Persons given nonpermanent appointments pursuant to section 1 of this order are hereby excluded from the operation of the Civil Service Retirement Act of May 29, 1930, as amended, unless eligible for retirement benefits by continuity of service or by reinstatement, or otherwise.

10. Civil Service Regulations

(a) 5 CFR 4.301(a)(19), (1949 Supp.) "War Service Regulations"

(19) "War Service Regulations" means the regulations issued by the Commission pursuant to Executive Order No. 9063 of February 16, 1942, as amended, and in effect from March 16, 1942 to March 7, 1946.

(b) 5 CFR 4.301(a)(16), (1949 Supp.) "Transitional Period"

(16) "Transitional Period" means the period from the revocation of the War Service Regulations to the

establishment of registers of sufficient eligibles for probational appointment, or to the time particular positions can be filled by persons having competitive status without the establishment of a register, as may be determined by the Commission.

(c) 5 CFR 4.301(a)(17), (1949 Supp.) "Transfer"

(17) "Transfer" means a change of position during continuous Federal service without a break of one work day from one agency to another, or within the same agency from one official headquarters to another or from one organizational unit to another.

(d) Nov. 15, 1950, 15 Fed. Reg. 7748: "Release"—"Reemployment Rights"

8.113 *Movement of employees between organizational units.* (a) After September 1, 1950, the employment without a break in service of employees of other agencies shall be by indefinite appointment rather than by transfer. • • •

8.114 *Release with reemployment rights.* (a) It shall be the responsibility of the agency to determine whether its employees may be released with reemployment rights for employment in another agency. Whenever it determines that under standards issued by the Commission, the release of an employee will be in the interest of the defense program, the agency shall release such employee with reemployment rights. A permanent employee shall be eligible for release with reemployment rights unless he has received, or is about to receive, a reduction-in-force notice. • • •

8.115 *Appointment of employees released with reemployment rights.* (a) The commission hereby delegates authority to agencies to give indefinite appointments to employees who have been released with reemployment rights by the agency in which employed:

Provided, The standards of the Commission are met and the promotion restrictions of 8.109 of this part are observed.

(6) Dec. 25, 1952, 17 Fed. Reg. 11735: Reduction in Force.

20.4(c)(1) *Group I—Career.* In the competitive service, this group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, except that career employees serving under conditional promotions shall be considered in this group with respect to positions at and below the grade in which they last served on a permanent basis. . . .

20.4(c)(2) *Group II—Career-Conditional.* In the competitive service, this group includes career employees who are conditional because they are serving probationary periods or are "temporary" or "indefinite" as the result of promotion, transfer, or reinstatement, or are subject to some other limitation of a similar nature. . . .

20.4(c)(3) *Group III—Indefinite.* This Group includes persons serving under non-status non temporary appointments in positions in the competitive service.

11. Navy Civilian Personnel Instruction 170, Reductions in Force, Feb. 10, 1953

3-3 b *Retention groups—competitive service.*

(1) *Group I—Career.* This group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, except that career employees serving under conditional promotion (Group

II) shall be considered in Group I with respect to positions at and below the grade in which they last served on a permanent basis.

(2) *Group II—Career—Conditional.* This group includes career employees who are conditional because they are:

(a) serving probationary periods, or

(b) are "temporary" or "indefinite" as the result of promotion, transfer, reinstatement (indefinite appointment in lieu of reinstatement), or are subject to some other limitation of a similar nature.

(3) *Group III—Indefinite.* This group includes employees serving under non-status non-temporary appointments.

* * *

3.7 COMPETITIVE CIVIL SERVICE STATUS.—Competitive civil-service status is one of the elements of retention Groups I and II tenure in the competitive service, and affects an employee's rights to the offer of a position in the competitive service under the placement procedures prescribed by the Commission, if he is reached for action in a reduction in force.

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